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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re S. G., a Person Coming Under the
Juvenile Court Law.

H035517
(Santa Clara County
Super. Ct. No. JD19028)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

R. G., et al.,

Defendant and Appellant.

Appellants R. G. and A. W. appeal from an order terminating their parental rights over their four-year-old daughter, S. G., and selecting adoption as a permanent plan pursuant to Welfare and Institutions Code section 366.26.¹ Appellants contend that the order must be reversed for failure to comply with the notice requirements of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA). We agree and remand to the juvenile court with directions to order the Santa Clara County Department of Family

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

and Children's Services (Department) to provide notice to the tribes in accordance with the ICWA.

I. Background

In June 2008, the Department filed a juvenile dependency petition and alleged that S. G. came with section 300, subdivision (b) (failure to protect). The petition further alleged: S. G. and her siblings² were at high risk of neglect and sexual abuse in the home of the paternal grandmother, T. J., who had a significant child welfare history with her own children; S. G.'s mother was unavailable to care for the children because she had been involuntarily hospitalized for psychiatric care; informal supervision and family maintenance had been ineffective; a referral for general neglect had been substantiated in January 2008; the children had been exposed to domestic violence; and S. G.'s father had a criminal and substance abuse history. The petition also included an Indian child inquiry attachment indicating that S. G. might have Indian ancestry based on conversations with the mother and paternal grandmother. However, the mother was unable to identify any tribes. The children were detained and the court ordered that notice under the ICWA be provided.

A few weeks later, a second amended petition was filed and alleged that the mother had left the hospital against medical advice. A third amended petition added the allegation that the mother had been diagnosed with schizophrenia and refused to take medication.

The jurisdictional/dispositional report stated that the social worker, Eric Acha, received a call from the paternal grandmother in June 2008. The paternal grandmother indicated that S. G.'s father has Indian ancestry, but the records perished in a fire. She

² S. G.'s siblings are not involved in this appeal.

also identified the father's tribe as Yaqui.³ Acha asked the paternal grandmother if there was anyone in the family who would be able to provide additional information and she replied that she would make efforts to contact some family members. The paternal grandmother later provided contact information for the paternal uncle, and indicated that he would be able to provide information about his aunt, who would have additional information. On July 28, 2008, Acha contacted the paternal uncle, who told him that the tribe associated with the family was not the Pascua Yaqui tribe, but the Jicarilla Apache Nation in Dulce, New Mexico. The paternal uncle could not provide additional information regarding his grandparents because they passed away when he was very young, and he no longer had contact information for his aunt. He stated that she lived 20 miles from his home and he would try to visit her and then call Acha.

Acha also spoke to the mother, who was unable to provide any information about her Indian ancestry. The mother referred Acha to the maternal grandmother. When Acha called the maternal grandmother, she was not home. Acha asked the maternal stepgrandfather to have his wife call him. The maternal grandmother did not return the call. However, a couple of weeks later, the maternal stepgrandfather contacted Acha and explained that the maternal grandmother was "very busy with her career and work[ed] extended hours." Acha again stressed the need for the maternal grandmother to return his call. The maternal grandmother did not contact Acha. Acha attempted to contact the maternal grandmother about six weeks later. He told the maternal stepgrandfather that he needed to speak with his wife about her grandchildren's Indian ancestry. According to the maternal stepgrandfather, there was a "very small" percentage of Indian ancestry, but

³ At the Department's request, this court has taken judicial notice of its nonpublished opinion *In re Gabriel M.* (June 14, 2004, H026482) [nonpub. opn.] and portions of the record in that case. In *In re Gabriel M.*, T. J., the paternal grandmother in the present case, claimed that the Department failed to comply with the ICWA. This court held that there had been compliance. The notice sent to the Apache tribes in *In re Gabriel M.* stated that T. J.'s grandmother was "Clara Viola M[.]" and did not include either a birth date or place of birth.

neither he nor his wife would be able to identify the tribe. When Acha asked him to have his wife contact him, he indicated that he would attempt to do so. The maternal stepgrandfather later contacted Acha and said that his wife would not be able to contact him, but he would attempt to gather information himself.

On July 30, 2008, the Department sent the ICWA notices to the Pascua Yaqui tribe in Arizona, the Jicarilla Apache Nation in New Mexico, and the Bureau of Indian Affairs (BIA). The notices contained identifying information about the paternal great-grandmother, stating that her name was Viola Clara M. (Married H[.]), she was born on July 3, 1930 in Albuquerque, New Mexico, she formerly resided in Los Lunes, New Mexico, she died on September 17, 1906 [sic] in Albuquerque, New Mexico, and she was associated with the Jicarilla Apache Nation in Dulce, New Mexico. On August 7, 2008, the Jicarilla Apache Nation responded that S. was not eligible for enrollment and suggested that other Apache tribes be contacted. On October 6, 2008, the Pascua Yaqui tribe stated that neither S. G. nor her parents were members of the tribe and that S. G. was not eligible for membership.

On September 4, 2008, the father filed a parental notification of Indian status stating that he might have Indian ancestry and be eligible for membership in the Apache tribe. On September 19, 2008, the Department sent a new set of the ICWA notices to each of the eight federally-recognized Apache tribes, including the Jicarilla Apache Nation which had already responded, and the Pascua Yaqui tribe. However, unlike the previous notices, these notices failed to include the paternal great-grandmother's married name, her place of birth, and her date of birth. During the month of September, the Yavapai-Apache Nation, the San Carlos Apache tribe, the Tonto Apache tribe, and the Mescalero Apache tribe responded that there was no record of any tribal membership or eligibility for membership for S. G. or her parents.

In mid-October 2008, the Department sent a copy of the original ICWA notice, including the additional information on the paternal great-grandmother to the BIA, the

Pascua Yaqui Tribal Council, and the Jicarilla Apache Nation, and informed them of the settlement conference on October 29, 2008. Copies of this notice were not mailed to the remaining federally-recognized Apache Indian tribes that had received the less complete notice one month earlier.

The October 29, 2008 addendum report indicated that Acha had transferred to employment outside the Department and was no longer assigned to the case.

On December 8, 2008, the juvenile court sustained the amended petition, declared S. G. a dependent child of the court, and granted the parents reunification services. In a report prepared for the interim hearing on January 21, 2009, the Department reported that it had received additional negative responses regarding tribal eligibility from the White Mountain Apache tribe, the Pascua Yaqui tribe, the Apache Tribe of Oklahoma, and the Fort Sill Apache tribe.

In January 2009, the social worker, Kitina Martin, visited the home of the maternal grandparents regarding their earlier indication that they wanted to be considered for placement for the children. After the maternal grandmother indicated that they were unsure whether they wanted to assume this responsibility, the social worker asked her to call her with a decision. There was no mention of possible Indian ancestry.

At the six-month review hearing, the juvenile court continued reunification services for the parents and set a 12-month review hearing at which compliance with the ICWA would be considered.

In July 2009, the Department filed a section 342 subsequent petition alleging that the father had sexually abused one of S. G.'s half siblings under section 300, subdivision (d) (sexual abuse). There was an Indian child inquiry attachment which indicated that S. G. had no known Indian ancestry. A first amended subsequent petition added section 300, subdivision (a) allegations that the father physically abused S. G.'s half siblings. The Indian child inquiry attachment again indicated that S. G. had no known Indian ancestry.

In a status review report, the social worker, Heesun Kim, recommended that reunification services be terminated and that a section 366.26 selection and implementation hearing be set. In September 2009, the juvenile court adopted these recommendations.

When the section 366.26 hearing was held in April 2010, the juvenile court inquired about the Department's efforts to comply with the ICWA. Kim stated that she had sent letters to every possible tribe that had been named by the family and she received responses indicating that S. G. had no connection to these tribes. Counsel for the Department clarified that Acha had sent the ICWA notices and she was not aware whether Acha had asked the paternal great-aunt if she had Indian heritage. In response to the juvenile court's questions, the paternal grandmother explained that she had been adopted and discovered two to three years ago that her ancestry included Apache Indian. She did not know whether she was Jicarilla Apache. She also stated that her aunt was still alive and was connected with the tribe. Kim stated that all the Apache tribes had received notice. The juvenile court asked Kim if she had contact with any other relatives, and Kim replied that she had not. The juvenile court then stated, "Okay. Then obviously you did not have a duty to inquire if you didn't have contact with any other relatives. If you had contact with any other relatives and they hadn't already been asked that would have been your job to ask them as a continuing worker. [¶] Okay. It sounds like notice has been given as required by law to the Apache Nation and the other agencies that needed to be contacted. Is there any objection to my making a finding that ICWA does not apply in this case?" After neither parent objected, the juvenile court found that the ICWA did not apply.

Following the hearing, the juvenile court terminated parental rights and selected the permanent plan of adoption. Both parents filed timely notices of appeal.

II. Discussion

Appellants contend that the juvenile court's finding that the Department complied with the notice requirements of the ICWA is not supported by substantial evidence. They argue that the Department failed to include all information in the ICWA notices sent in September 2008 and to fully investigate their Indian heritage.

“In the context of juvenile dependency proceedings, notice to Indian tribes is governed by both federal and state law. ICWA provides that if ‘the court knows or has reason to know that an Indian child is involved’ in an involuntary state court proceeding, ‘the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child’s tribe’ [Citation.] Section 224.2, subdivision (b) reiterates that ‘[n]otice shall be sent whenever it is known or there is reason to know that an Indian child is involved, and for every hearing thereafter . . . unless it is determined that the Indian Child Welfare Act [] does not apply to the case’” (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1197.)

In order to ascertain a child's status under the ICWA, the notices must contain sufficient information to be meaningful. (*In re K. M.* (2009) 172 Cal.App.4th 115, 119.) The notice must include the following information, if known: the child's name, birth date and birthplace; the name of the tribe the child is enrolled in or may be eligible for enrollment; names and addresses of the child's parents, grandparents, great-grandparents, and other identifying information; and a copy of the petition. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.) “It is essential to provide the Indian tribe with all available information about the child's ancestors, especially the one with alleged Indian heritage. [Citation.] Notice . . . must include available information about the maternal and paternal grandparents and great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying date. [Citation.]” (*Ibid.*) When the Department possesses identifying Indian heritage information that it does not provide to

one or more tribes of whom the dependent child might be a member, the notices do not comply with the ICWA. (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995.)

“‘Since . . . failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, notice requirements are strictly construed.’ [Citation.] When proper notice is not given under the ICWA, the court’s order is voidable. [Citation.]” (*In re Karla C.* (2003) 113 Cal.App.4th 166, 174.)

Here, the Department was informed that S. G. might have Indian ancestry, and there was some confusion as to which tribe. The Department then sent notices to the Pascua Yaqui tribe and the Jicarilla Apache tribe on July 30, 2008 and in mid-October 2008 that contained information about the paternal great-grandmother that was not included in the notices sent to the other federally-recognized Apache tribes on September 19, 2008. The September notices lacked the paternal great-grandmother’s married name, her date of birth, and her place of birth. Given that the October notices contained the additional information, it appears the information was inadvertently omitted in the September notices. Since all available information was not included in the notices to each of the Apache tribes, the order must be reversed and remanded for compliance with the notice requirements of the ICWA.

The Department argues that “as far back as 2003, [the paternal grandmother] claimed Jicarilla Apache heritage, but that tribe was unable to verify any family connection.” However, the notices sent to the Apache tribes at that time provided a different name for the paternal great-grandmother and no other information about her. According to the paternal grandmother, the family was now aware of additional information. Thus, the record in the previous case involving the paternal grandmother does not assist the Department’s position.

The Department also argues that “[i]f the parents considered the omitted information about the paternal great-grandmother determinative, they should have

brought it to the Department's attention or to the court's attention when the copies of the notices were submitted." There is no merit to this argument. As this court acknowledged in *In re Samuel P.* (2002) 99 Cal.App.4th 1259, "[t]he notice requirements [of the ICWA] serve the interests of the Indian tribes 'irrespective of the position of the parents' and cannot be waived by the parent. [Citation.]" (*Id.* at p. 1267.)

We next consider appellants' contention relating to the investigation of the mother's Indian heritage.

The Department must inquire as to possible Indian ancestry and act on any information it received. (*In re Levi U.* (2000) 78 Cal.App.4th 191, 199.) However, there is no duty to conduct an extensive independent investigation for information. (*Id.* at pp. 198-199.)

In the present case, the social worker spoke to the mother, who was unable to provide any information and referred him to her mother. The social worker called the maternal grandmother and left a message for his call to be returned. There was no response. However, a couple of weeks later, the maternal stepgrandfather contacted the social worker and explained that the maternal grandmother was "very busy." The social worker again stressed the need for the maternal grandmother to return his call, but there was no response. About six weeks later, the social worker attempted to contact the maternal grandmother and told the maternal stepgrandfather that he needed to speak with her about her grandchildren's Indian ancestry. According to the maternal stepgrandfather, there was a "very small" percentage of Indian ancestry, but neither he nor his wife would be able to identify the tribe. When the social worker asked him to have his wife contact him, he indicated that he would attempt to do so. The maternal stepgrandfather later contacted the social worker and said that his wife would not be able to contact him, but he would attempt to gather information himself. The maternal stepgrandfather did not provide any additional information. Having made several efforts to contact the maternal grandmother, the Department fulfilled its obligation under the

ICWA to act on the information that the family provided. (*In re Levi U.*, *supra*, 78 Cal.App.4th at p. 199.)

III. Disposition

The order is reversed. The case is remanded to the juvenile court with directions to order the Department to provide notice to the tribes in accordance with the ICWA. If, after proper notice, the court finds that S. G. is an Indian child, the court shall proceed in conformity with the ICWA. If, after proper notice, the court finds that S. G. is not an Indian child, the order terminating parental rights and selecting adoption as the permanent plan shall be reinstated.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.